UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

JAM PRODUCTIONS, LTD., AND EVENT PRODUCTIONS, INC., A SINGLE EMPLOYER

and **13-CA-177838**

THEATRICAL STAGE EMPLOYEES UNION LOCAL NO. 2, IATSE

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Respectfully submitted:

/s/ Kevin McCormick

Kevin McCormick, Esq.
Counsel for the General Counsel
National Labor Relations Board
Region 13
219 South Dearborn, Room 808
Chicago, Illinois 60604

I. INTRODUCTION [1]

The facts of this case are undisputed. Respondent JAM Productions, Ltd. and Events Productions, hereafter "Respondent",[2] discharged fifty-five (55) of its stagehand employees, known as the "Shaw Crew," after their supervisor, Chris "Jolly Roger" Shaw, on September 16, 2015, in retaliation for their union activities. These mass terminations were the subject of the unfair labor practice proceedings in 13-CA-160319. Since March 28, 2016, when it signed a settlement agreement with the Regional Director of Region 13, Respondent, through its production manager, Behrad Emami, engaged in conduct "inherently destructive" of the stagehand employees' Section 7 rights. Respondent wantonly failed to restore the status quo as it was for the stagehands before they engaged in union activities and has since their terminations, failed to do so as is required under the National Labor Relations Act.

Respondent's Shaw Crew stagehands are entitled to their full remedy under Board law. Respondent has, as part of complying with the settlement agreement, paid some backpay and even called a portion of the employees back to work. However, the status quo for these employees before they unionized has not been restored. Since the stagehand employees who worked at the Riviera Theatre were terminated, Respondent has hired and continues to utilize stagehands that were replacements for the Shaw Crew employees. By doing so, Respondent has cut the work hours of the Shaw Crew employees roughly in half. Respondent cannot pick and choose how much or by what percentage it wishes to obey the law. By terminating the Shaw Crew and only partially complying with the settlement agreement, Respondent tries to have it both ways, that is, send a message to all its employees that union activity will not tolerated and

[1] Hereafter the National Labor Relations Board will be referred to as the "Board"; and the National Labor Relations Act as the "Act". With respect to the record developed in the case, the Joint Motion and Stipulation of Facts will be referred to by corresponding Numbers. All Joint Exhibits will be referred to as "Jt. Ex."

[2] JAM Productions, Ltd. and Event Productions, Inc. have stipulated to single employer status. Paragraph Number 4.

placate the National Labor Relations Board at the same time. This intentional and inherently destructive strategy must not be allowed.

Respondent will present arguments ad nauseum about the language of the settlement agreement, the settlement negotiations, and what it understood the language to mean but these defenses are smokescreens and completely irrelevant to the case.[3] The only relevant issue to this case is whether Respondent's supervisor Behrad Emami committed an unfair labor practice violating Sections 8(a)(3) and (4) of the Act when he began recalling the Shaw Crew employees back for work on March 28, 2016. The relevant undisputed facts of this case clearly show that Respondent's formulaic recall method, that is, calling roughly equal proportions of the Shaw Crew and the New Riviera Crew to work shows, is inherently destructive of the Shaw Crew's Section 7 rights.

II. BEHRAD EMAMI'S METHOD OF RECALLING THE SHAW CREW WAS INHERENTLY DESTRUCTIVE OF THE EMPLOYEES SECTION 7 RIGHTS.

To show a violation of Section 8(a)(3) and (4), the General Counsel has the initial burden to show that protected conduct was a motivating factor in an employer's decision. The elements commonly required to support a finding of unlawful motivation are union activity, the employer's knowledge of that activity, and evidence of animus. *Hawaiian Dredging Construction Company, Inc.*, 362 NLRB No. 10 slip op. at 3 (2015)(citing *Wright Line*, 251 NLRB 1083 (1980)). The burden then shifts to the employer to demonstrate that it would have taken the same action even in the absence of the employees' union activity. *Id.* In certain circumstances an unfair labor practice may be committed even in the absence of an unlawful motivation. Where an employer's discriminatory action is "inherently destructive" of employees'

[3] Counsel for the General Counsel objects to the relevance of Paragraph Numbers 15, 16, 17, 20, and 21 in the Joint Motion and Stipulation of Facts in their entirety and moves for those numbered facts to be stricken. Counsel for the General Counsel also objects to the relevance of Joint Exhibits 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, and 22 and moves for those exhibits to be stricken as well.

rights no proof of unlawful motivation is required. *Id*. slip op. at 5 (citing *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967)).

A. Union Activities and Respondent's Knowledge.

The first element of the *Wright Line* framework is completely undisputed. Respondent's business is supplying labor, including stagehands, for concerts, shows and events by various performers at venues including the Riviera Theater. Before September 16, 2015, Chris "Jolly Roger" Shaw was the crew manager in charge of assigning stagehands to work shows at the Riviera Theater. The Shaw Crew consisted of the fifty-five individuals listed in Paragraph Number 8 of the Joint Motion and Stipulation of Facts. Shaw typically assigned these stagehands for shows at the Riviera. Respondent terminated Shaw and the Shaw Crew on September 16, 2015.[4] Leading up to that time, the Shaw Crew had been organizing with the Union. Consequently, and as a result of the employees' union activities, on September 17, 2015, the Union filed a petition with Region 13 of the National Labor Relations Board to represent the stagehands at the Riviera, Park West and Vic Theater. Jt. Ex. 2. Thus, the Shaw Crew's union activities are not at issue.

Similarly, those individual Shaw Crew employees who participated in the investigation and settlement of case 13-CA-160319 also engaged in protected activity. See *Mesker Door, Inc*., 357 NLRB 591, 594 (2011). On April 6, 2016, the Regional Director for Region 13 of the National Labor Relations Board approved a settlement agreement and notice. Paragraph Number 14. Before that time, the same employees Respondent terminated were listed in the settlement agreement. Jt. Ex. 5. Respondent was not aware specifically which witnesses cooperated with the Region in case 13-CA-160319, but clearly knew at least some, if not all, of the Shaw Crew had participated. "The Board and the courts have recognized that if the Board is to perform its

[4] The last day for the Shaw Crew was either September 16, 18, or 21, 2015. Paragraph Number 10.

statutory function of remedying unfair labor practices its procedures must be kept open to individuals who wish to initiate unfair labor practice proceedings, and protection must be accorded to individuals who participate in such proceedings. Therefore, it is not surprising that '[t]he approach to Section 8(a)(4) generally has been a liberal one in order fully to effectuate the section's remedial purpose.'" *General Services, Inc.*, 229 NLRB 940, 941 (1977)(citing *N.L.R.B*. v. *Scrivener, d/b/a AA Electric Co.*, 405 U.S. 117, 124 (1972)). The Board has included within the protections of 8(a)(4) job applicants, employees of other employers, and supervisors. *Id.* Although the section literally only protects those who have "filed charges or given testimony," the Board has also protected those who provide affidavits or sworn statements, those who refuse to testify voluntarily, employees who the employer erroneously believes have filed charges against him, and employees who testify against former employers. *Id.* Finally, the phrase in Section 8(a)(4) prohibiting the employer from "otherwise" discriminating against an employee has been broadly interpreted to include rehiring conditioned upon the dropping of charges with the Board, refusing to hire a job applicant, and refusing to rehire an employee even where the original dismissal was nondiscriminatory. *Id.*

The protected nature of those Shaw Crew employees activities protects the entire group especially considering all their names were included in the informal settlement agreement. By terminating the entire group and later recalling them in an inherently destructive manner, Respondent made sure to rid itself of the Shaw Crew problem. The Shaw Crew's cooperation with the Region's investigation and settlement of the matter in 13-CA-160319 led to the names of the entire Shaw Crew being named in the informal settlement agreement and to Respondent's unfair labor practice in the current matter.

Respondent's knowledge of the Shaw Crew's union and protected activities is also undisputed and clear from the evidence. On September 22, 2015, Respondent hired Behrad Emami to take Chris Shaw's place and to be the regular production manager at Riviera Theater. Jt. Ex. 24. On the same day that Respondent signed the settlement agreement and notice to employees on March 28, 2016, Jerry Mickelson, Respondent's Chairman, vice president and secretary, issued a memorandum to Behrad Emami. Paragraph Number 19. Jt. Ex. 19. In the memorandum, Mickelson instructed Emami specifically to hire stagehands from the Shaw Crew, "without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner." Jt. Ex. 19. At the very latest, Respondent knew of the Shaw Crew's union activities on September 17, 2015, when the petition was filed. Knowledge of the employees' cooperation with the Region is clear from the settlement agreement itself.

B. Behrad Emami's Inherently Destructive Recall.

As mentioned previously, the General Counsel's burden generally requires a showing of discriminatory motive. In this case, Respondent's anti-union animus is obvious from its mass termination of the Shaw Crew the day before the union filed a petition to represent them. Paragraph Number 10-11. Jt. Ex. 2. Notwithstanding Respondent's clear hostility to unions, in certain situations as in the present case, no proof of discriminatory motive is needed and the Board can find a violation even if the employer introduces evidence of a business justification. *Hawaiian Dredging*, supra. Conduct is deemed to be "inherently destructive" if it "would inevitably hinder future bargaining or create visible and continuing obstacles to the future exercise of employee rights." *Id*. slip op. at 5 (citing *D & S Leasing*, 299 NLRB 658, 661 (1990)).

The Board has applied the "inherently destructive" standard to similar situations where an employer discharges all employees of a particular craft because of their affiliation with and referral from a union. See *Catalytic Industrial Maintenance (CIMCO)*, 301 NLRB 342 (1991). Similarly, in *Jack Welsh Co*., 284 NLRB 378 (1987), the Board found a violation where the employer discharged employees after the expiration of its 8(f) contract and replaced them with unrepresented employees. In both *CIMCO* and *Jack Welsh*, specific evidence of antiunion motivation was unnecessary because the discharges were inherently destructive of employee rights. *CIMCO*, 301 NLRB at 347 fn. 17; *Jack Welsh*, 284 NLRB at 383 fn. 10.

Simply put, in this case, in order for the Respondent to comply with Board law, Behrad Emami should have called members of the Shaw Crew *before* any members of his own crew for all shows after March 28, 2016. Anything less than that is inherently destructive of those employees Section 7 rights. Beginning after March 28, 2016, Respondent, through Behrad Emami, began offering and assigning work to the employees named in the Settlement Agreement and Notice, i.e. the Shaw Crew. Paragraph Number 25. In his September 28, 2016, affidavit, Emami describes the method by which he contacted and offered work to the employees at the Riviera Theater. Paragraph Number 26. Jt. Ex. 24, Pg. 4. After Emami was hired to take over the responsibilities of Chris Shaw, he had his own pre-existing group of around 25 to 30 stagehands from a list he developed with an individual named Jason Plahutnik (the "New Riviera Crew"). Jt. Ex. 24, Pg. 2. Between September 16, 2015, until March 28, 2016, Emami only assigned stagehand employees using the New Riviera Crew. After receiving his instructions from Jerry Mickelson, Emami began hiring for shows in what he describes as "equal shares of work." Jt. Ex. 24, Pg. 4. That is, for each show that came up, Emami would "basically split the crews in half and then tried to give work to both groups." Jt. Ex. 24, Pg. 5.

As instructed by Jerry Mickelson in March 28, 2016, memo, Behrad Emami also kept a log of the calls he made to fill the positions for each show. Paragraph Number 33. Jt. Ex. 19; 24, Pg. 5; 27. The log shows each person Emami called, how he contact the individual (text or phone call), the date and time of the contact, whether he succeeded in making contact, and the individual's response. Paragraph Number 33. Jt. Ex. 27. For all of the individuals listed on the call logs, names listed with either yellow or green highlights are Shaw Crew employees. Paragraph Number 37. Those with no highlights are from the New Riviera Crew. Paragraph Number 37.

Emami followed his "equal share" approach for all the shows after March 28, 2016. For example, the first show that Emami made phone calls and sent texts for was the Underoath show on April 7, 2016. Jt. Ex. 24, Pg. 5; Jt. Ex. 27, Pg. 1. Out of thirteen (13) calls and texts, Emami contacted six (6) stagehands from the Shaw Crew. Jt. Ex. 27, Pg. 1. Emami picked these six individuals from the "most active working Riv shows" list attached to Jerry Mickelson's memo. Jt. Ex. 19, Pg. 2. The remaining seven (7) employees came from the New Riviera Crew.

Emami took the same formulaic approach for The Floozies show on April 9, 2016. A total of ten (10) stagehand employees received pay for the show according to Emami and payroll documents. Jt. Ex. 24, Pg. 6. Jt. Ex. 28. While filling the crew, Emami contacted by phone or text nineteen (19) individuals as shown on his call log. Jt. Ex. 24, Pg. 6. Jt. Ex. 27, Pg. 1. Once Emami received enough "Yes, confirmed" contacts from stagehands in order to fill the entire crew, he would stop making calls. Jt. Ex. 24, Pg. 7. Out of the nineteen contacts that Emami made, thirteen (13) were members of the Shaw Crew. Jt. Ex. 27, Pg. 1. The remaining six (6) were New Riviera Crew members. Although Emami ended up contacting a higher number of Shaw Crew members than New Riviera Crew, this was largely due to the availability of the

workers and their response time. Jt. Ex. 24, Pg. 8. Jt. Ex. Any variations were not due to any change in Emami's formula on how he would contact the stagehands.

For the Mudcrutch show on May 28, 2016, Emami had to make sixty-five (65) contacts to fill the twenty-five (25) slots needed for the show. Jt. Ex. 24, Pg. 8; Jt. Ex. 27, Pg. 4. One of those slots would be filled, as always, by John Booher the stage manager. Jt. Ex. 24, Pg. 8. For the remaining twenty-four (24), as Emami stated, he tried "as best [he] could to get work divided equally between the two groups." Jt. Ex. 24, Pg. 8. Emami contacted thirty (30) of the Shaw Crew and thirty-five (35) of the New Riviera Crew before he had a full crew. Jt. Ex. 27, Pg. 4. Ultimately, he placed only eight (8) of the Shaw Crew.[5] As the Settlement Agreement from April 6, 2016, lists a total of fifty-five (55) people, who may or may not have been able to work at that time, Respondent could have potentially filled the entire crew with members of the Shaw Crew. Instead, Emami's "equal share" approach continued to deprive members of the Shaw Crew of offers for work and a return to the status quo as it was before Respondent's illegal terminations.

Emami's inherently destructive approach continued for the June 9, 2016, Macklemore and Ryan Lewis show. Jt. Ex. 24, Pg. 9; Jt. Ex. 27, Pg. 7. For the more than thirty three slots available, [6] Emami made phone calls and texts to thirty-four (34) members of the Shaw Crew, and thirty-five (35) members of the New Riviera Crew. Jt. Ex. 27, Pg. 7. Once again, Emami could have called and filled the entire crew with members of the Shaw Crew. Instead he chose to follow his inherently destructive "equal share" philosophy. Emami even informed employees of what he was doing when he called Justin Huffman, a prominent member of the organizing

[5] Although Emami states in his affidavit he placed 8 Shaw Crew members, the Production Employee Timesheet shows only seven (7) received pay. Jt. Ex. 28, Pg. 12.
[6] While Behrad Emami states in his affidavit that there were around 33 slots, the Production Employee Timesheet shows that forty (40) employees were paid including stage manager John Booher. Jt. Ex. 28.

campaign from the Shaw Crew. Paragraph Number 43. Jt. Ex. 24, Pg. 10. Huffman stated that "it was his understanding that all the crew spots were to be designated for [Shaw Crew] members." Jt. Ex. 24, Pg. 10. Emami responded that he "would try to get a fair split of 50-50 between the groups." Jt. Ex. 24, Pg. 10.

As the Riviera Crew Call Log and the Production Employee Timesheets show, Emami continued to staff his crews in an inherently destructive way throughout the season. His so called "equal shares" approach sends a clear message to the members of the Shaw Crew who engaged in union organizational activities. While at first blush, Emami's approach appears to be fair and non-discriminatory because it endeavors to split the work evenly between the Shaw Crew and his own crew, upon further consideration, the discriminatory effect becomes clear. Put simply, the Shaw Crew was entitled to be assigned to *all* of the work, not just half. By implementing Emami's approach, Respondent's message to those employees is that it is punishing those union activists by cutting their work in half. The Shaw Crew employees were clearly aware of Respondent's settlement agreement with the Region and hoped to return to the terms and conditions of employment as they were before September 16, 2015, when they were terminated. Instead, Respondent has its cake and is eating it too. That is, while partially remedying its egregious unfair labor practices, Respondent will "inevitably hinder future bargaining or create visible and continuing obstacles to the future exercise of employee right." *D & S Leasing,* supra. Unless Respondent is required to call those individuals listed in the settlement agreement and notice first, the Shaw Crew will never be free of coercion for their union activities. They will always know that they receive half as many offers to work shows because they chose to exercise their Section 7 rights.

As mentioned before, Respondent will argue that based on its communications with Board Agents and the language of the settlement, it has not violated the Act. Respondent's arguments fail for several reasons. First, the Board has long recognized make whole relief requires not only the restoration of lost wages but any benefits they had. *All Purpose Services, Inc.*, 343 NLRB No. 85, slip op. at 2(2004). The benefits the Shaw Crew enjoyed had included being called to work shows before anyone else. If Respondent advised Emami to utilize his "equal share" approach, then he was given an incorrect and misguided explanation of what the Act requires. If Emami came up with his approach on his own, his unfair labor practice is still attributable to Respondent. Respondent cannot claim that it is making Shaw Crew whole by offering them half as much work. Regardless of whatever intentions Emami had to be fair, he still offered work in an inherently destructive manner.

III. CONCLUSION

The overwhelming and undisputed evidence shows that Respondent's recall of the Shaw Crew has and continues to violate Section 8(a)(3) and (4) of the Act. By taking a roughly 50/50 formulaic approach to offering work to the Shaw Crew of employees, Respondent, through Behrad Emami, intentionally keeps in place a punishment for those employees engaging in union activities and cooperating with the Board. Only an Order requiring the Respondent to make the Shaw Crew whole, including but not limited to, that they be contacted for work before the New Riviera Crew or any other employees, will recreate the status quo as it was before their unlawful mass terminations.

DATED this 24th day of April, 2017.

Respectfully Submitted,

/s/ Kevin McCormick

_____

Kevin McCormick, Esq.
Counsel for the General Counsel
National Labor Relations Board
Region 13
219 South Dearborn Street, Room 808
Chicago, Illinois 60604
(312) 353-7594

CERTIFICATE OF SERVICE
13-CA-177838

The undersigned hereby certifies that true and correct copies of Counsel for the General Counsel's Brief to the Administrative Law Judge have been e-filed with the Division of Judges and served this 24th day of April, 2017, in the manner indicated, upon the following parties of record.

ELECTRONICALLY

Michael A. Rosas, Administrative Law Judge
National Labor Relations Board
Division of Judges
121 West 45th Street, 11th Floor
New York, NY 10036-5503
Michael.rosas@nlrb.gov

Greg Shinall
Sperling & Slater
55 W. Monroe Street, Suite 3200
Chicago, IL 60603-5072
Shinall@sperling-law.com

Steven L. Gillman
Holland & Knight LLP
131 South Dearborn Street
30th Floor
Chicago, IL 60603
Steven.gillman@hklaw.com

David Huffman-Gottschling, Esq.
Jacobs, Burns, Orlove & Hernandez
150 N. Michigan Ave., Ste 1000
Chicago, IL 60601-7569
DavidHG@jbosh.com